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In the Supreme Court of the United States

OCTOBER TERM, 1981

DORIS MARIE DARVILLE, ET AL AND
MARYLAND CASUALTY COMPANY,
Petitioners,

versus

TEXACO, INC. AND C. A. REISDORF,
Respondents.

Petition For A Writ Of Certiorari To The
United States Court of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Does limiting a plaintiff solely to a cause of action for workers' compensation, on the basis that he was a statutory employee of a principal contracting with his direct employer when he was injured in the course and scope of his employment, violate his right to Equal Protection under the Fourteenth Amendment to the Constitution of the United States when a direct employee of the principal injured with the statutory employee by the same cause could have causes of action for wrongful death and for workers' compensation?

2. Did the Court of Appeals for the Fifth Circuit err as a matter of law and fact in upholding the grant of summary judgment, holding that the decedent of petitioners, Doris Marie Darville and her children,[1] was the statutory employee of the respondent, Texaco, Inc., when he was killed in the course and scope of his employment?

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[1] The parties to the proceeding in the Court of Appeals for the Fifth Circuit sought to be reviewed herein not listed in the caption of the case in this Court are the four minor children of petitioner, Doris Marie Darville, Marvis Darville, Tiki Darville, Bryan Darville, and Austin Darville, Jr.

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Petitioners, Doris Marie Darville, her minor children, Marvis Darville, Tiki Darville, Bryan Darville, and Austin Darville, Jr., and Maryland Casualty Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 29, 1982.

(Parent co.)
American General Corporation

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 674 F.2d 443, is reprinted in the Appendix hereof.

The denial of rehearing by the Court of Appeals for the Fifth Circuit is reprinted in the Appendix hereof.

No opinion was rendered by the District Court for the Eastern District of Louisiana.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 29, 1982. A timely petition for rehearing was denied on May 26, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

TEXT OF AUTHORITIES INVOLVED

Fourteenth Amendment to United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LSA-R.S. § 23:1032:

Exclusiveness of rights and remedies; employer's liability to prosecution under other laws

The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer, or any principal or any officer, director, stockholder, partner or employee of such employer or principal, for said injury, or compensable sickness or disease. For purposes of this Section, the word "principal" shall be defined as any person who undertakes to execute any work which is a part of his trade, business or occupation in which he was engaged at the time of the injury, or which he had contracted to perform and contracts with any person for the execution thereof.

Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act.

The immunity from civil liability provided by this Section shall not extend to: 1) any officer, director, stockholder, partner or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope

of his employment; and 2) to the liability of any partner in a partnership which has been formed for the purpose of evading any of the provisions of this Section. Amended by Acts 1976, No. 147 § 1.

LSA-R.S. §23:1061:

Principal contractors; liability.

Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.

Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor.

STATEMENT OF THE CASE

On December 3, 1979, Austin Darville died in an explosion which occurred while he was vacuuming the American Petroleum Institute (API) Separator at Texaco, Inc.'s refinery at Convent, Louisiana. Darville was employed as a vacuum truck operator by Louisiana Vacuum Services, Inc. His employer was under contract with Texaco to furnish, maintain and operate vacuum trucks, on a call-out basis, to remove acid, caustic oil, water, sludge, liquid hydrocarbons, and their mixtures accumulating in the API Separator. Under this contract Louisiana Vacuum Services, Inc. agreed to indemnify Texaco and hold it harmless against all claims arising from the contract, including workers' compensation claims. Darville's wife, Doris Marie Darville, individually and on behalf of their four minor children, filed a diversity action against Texaco, Inc. and one of its executive officers, C. A. Reisdorf, on tort theories of negligence, strict liability, and intentional tort, arising from Darville's death. Maryland Casualty Company, Louisiana Vacuum Services' workers' compensation insurer, intervened on behalf of the plaintiffs.

Texaco moved for summary judgment, claiming statutory employer status conferring tort immunity under Louisiana workers' compensation law. In support of this motion, Texaco filed the affidavit of its plant manager at Convent, which attested that at eight of Texaco's eleven other refineries in the United States, Texaco personnel are

utilized in the vacuuming operation performed under contract by Louisiana Vacuum Services, Inc. at the Convent refinery. It was uncontested that, at Convent, no Texaco personnel were used in the course of that vacuuming work. In opposition to Texaco's motion, the plaintiff offered affidavits attesting that, when Darville died, oil refineries in Louisiana generally contracted with vacuum service companies to obtain vacuum truck service for such units at APR Separators and that such vacuuming of waste sludge from separators is not part of the manufacturing process of converting crude oil into petroleum products. The District Court granted Texaco's summary judgment, holding that there was no genuine factual dispute and that Texaco was Darville's statutory employer, and, as such, immune from suit for tort damages. The Court of Appeals upheld the grant of summary judgment on that basis.

REASONS RELIED ON FOR GRANTING THE WRIT

The Court should grant the writ because of the importance of the issue and the existence of a direct conflict within the Court of Appeals for the Fifth Circuit. See *Williams v. Shell Oil Co.*, 677 F.2d 506 (5th Cir. 1982) and cases cited therein. This intra-circuit conflict is an important reason for granting the writ because the issue is a recurrent one within the Fifth Circuit, where the oil exploration and refining industry is so highly concentrated and so highly dangerous.[2] Cf. *Maggio v. Zeitz*, 333 U.S. 56,

[2] See the article on the oil industry in Louisiana in the August 8, 9, and 10, 1982 issues of the Times-Picayune-States-Item, New Orleans, Louisiana, wherein it was reported that the oil industry is the most dangerous in the United States, exceeding even mining in its death and injury toll.

59-60 (1948).

Louisiana workers' compensation law (LSA-R.S. § 23:1061) is nearly unique in the extent to which it extends to principals contracting for special services immunity from tort actions by the contractors' employees injured while carrying out the contracted work. See Larson, The Law of Workmen's Compensation, §§49.12, 72.31. The test for determining statutory employers was sent out by the Fifth Circuit in *Blanchard v. Engine & Gas Compressor Services, Inc.*, 613 F.2d 65, 71 (5th Cir. 1980) after the Louisiana Supreme Court refused to answer the question when it was certified to it. Judge Brown expressed his court's quandary in the face of the flood of litigation involving this issue as follows:

> Although in practice—at least as we see it in the flood of diversity and maritime or quasi-maritime cases—the purpose of the section is urged, looked upon or held to be immunity to traditional third party tort liability, the true purpose of this provision, as long ago described (and since many times echoed) in Horrell v. Gulf & Valley Cotton Oil Company, Inc., 15 La.App. 603, 610, 131 So. 709, 714 (1930) is:
>
> > to protect employees of minor contractors against the irresponsibility of their immediate employers by making the principal employer, who has general control of the business in hand, liable as if he had directly employed all who work upon any part of the business which he has undertaken to carry on.

> Coincident with this responsibility placed on the statutory employer, the Louisiana Workman's Compensation Act, LSA-R.S. 23:1032 (West Supp. 1979), limits a contractor's employee's recovery to the compensation benefits. The result is that a statutory employer cannot be sued in tort. Of course, the "exclusive remedy" defense will not bar a tort action against the principal if it is not a statutory employer, that is, if the work performed by the contractor was not part of the defendant's "trade, business or occupation."

Judge Tate, in *Shell, supra*, at p. 508 discussed the point further:

> While much of the litigation concerning section 1061 has occurred in suits where the injured worker is claiming a tort remedy against a defendant who raises the exclusivity of compensation as a defense, that was not the primary purpose of the statute. The fundamental purpose behind the liability of a principal to the employees of a contractor is to prevent principals from contracting out their work in order to evade liability for workmen's compensation benefits to the employees who actually perform the principal's business by interposing an impecunious independent contractor or subcontractor between the principal and his employee. Malone and Johnson, Louisiana Civil Law Treatise: Workers' Compensation, §§ 121-127 (2d ed. 1980). To this end, the coverage had been liberally construed. However, "it is well to keep in mind the purpose of Section 1061. Ordinarily the principal should not be subjected to the compensation claims of his contractor's employees; it should rest with the contractor. It is only when the principal seeks to avoid his compensation obligation by farming

> out part of his own normal operations to a contractor that an evil arises which requires exceptional treatment. Section 1061 serves as a secondary protection for the injured worker, rather than as the primary remedy." Malone and Johnson, supra, § 126 at 262. Thus, when work is customarily done by specialized contractors, the purpose behind the rule is not violated and the reason for holding the principal directly liable in compensation exclusively does not come into play. Malone and Johnson, supra, § 78 at 144, § 126 at 262.

The only difference between this case and the Shell case is that Shell's own factual showings demonstrated a genuine factual dispute making summary judgment inappropriate.[3] However, the facts disputed were of the very same sort, and concerned exactly the same issues, as in this case, where the plaintiff's affidavits opposing the summary judgment were unquestionably admissable. How, then, can a different result be reached? We see, then, that the conflict here is quite live and real.

Furthermore, the result here not only is wrong under *Blanchard, supra*, and the law governing summary judgment, but violates the plaintiff's Equal Protection rights. Texaco says its personnel at other refineries are utilized in the same operation that led to Darville's death at Convent. Let us suppose such a Texaco employee had been working

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[3] To the extent that Judge Tate's mention of this case in footnote 8 of his opinion in *Shell, supra*, at p. 510, indicates otherwise, it is based on a misreading of the decision, overlooking the acknowledgment therein of opposing affidavits as to industry practice regarding contracting out vacuuming services.

with Darville and died in the explosion with him as a result of negligence on the part of both Texaco and Louisiana Vacuum Services. If we apply the result below, along with the body of Louisiana workers' compensation law, the result is manifestly unfair and unconstitutional. First, Darville's survivors would be limited to recovering workers' compensation benefits for his death. Those benefits would come exclusively through Darville's direct employer, Louisiana Vacuum Services, under the terms of its hold harmless contract with Texaco and Texaco's right to indemnity under LSA-R.S. § 23:1061. However, while the Texaco employee's survivors could not recover anything more than workers' compensation from Texaco, nothing would bar them from also suing Louisiana Vacuum Services (and Darville's survivors) in tort.[4]

In this hypothetical, then, under the decision below, Darville falls into a class of injured workers who are barred from any tort recovery whatsoever solely on the basis of their legal status as statutory, as opposed to direct, employees. His fellow victim of industrial negligence, however, can seek both tort damages and workers' compensation.

What is the rational distinction between them to

[4] Texaco, in turn, could seek indemnity from Louisiana Vacuum Services for the workers' compensation benefits paid to the survivors of its own direect employee and bar Louisiana Vacuum Services, Inc. from seeking contribution from Texaco as a joint tortfeasor under its hold harmless contract; and stand the very real chance of paying nothing to anyone under any circumstances, regardless of the degree of its culpability.

support such a result under the Equal Protection Clause? The fundamental basis of workers' compensation statutes is that the worker gets benefits for all work-related injuries, regardless of cause, and the employer is excused from any tort liability. However, the hypothetical above illustrates how the result below turns this quid pro quo on its head. Darville's survivors get workers' compensation from Louisiana Vacuum Services, Inc. but no chance to assess Texaco for whatever responsibility it has for his death. The dead Texaco employee, doing the same work at the same time for Texaco too, leaves his survivors a cause of action against Texaco for workers' compensation (which it can make Louisiana Vacuum Services, Inc. pay) and a cause of action in tort against Louisiana Vacuum Services, Inc. (in which Louisiana Vacuum Services, Inc. will be barred from seeking contribution from its possibly joint tortfeasor, Texaco).

In conclusion, then, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit, not merely to correct the manifest errors of fact and law therein, but to resolve the direct conflict it poses with other Fifth Circuit jurisprudence and, thereby, avoid a clearly unconstitutional, as well as contradictory result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 1982, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Charles L. Chassaignaic, Wiley L. Lastrapes, Jr. and Joan G. Quinters, Chaffee, McCall, Phillips, Toler & Sarpy, 1500 First National Bank of Commerce Building, New Orleans, Louisiana 70112, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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